Petition

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

BERNARD J. COVEN,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Where a government agent equipped with a clandestine recording device conducts a warrantless surveillance of an investigating target's premises and eavesdrops on conversations to which he is not a party and records them and seizes the contents of documents in the target's premises by reading them into the recorder, does such conduct constitute a violation of the target's Fourth Amendment rights to the extent of rendering the data so gathered inadmissible at the later criminal trial of the target?

(2) Where a District Judge, prior to the institution of a lawsuit and prior to assuming jurisdiction of a case, is told, by the government, that the defendants in the lawsuit are targets of a government criminal investigation involving the subject matter of the forthcoming lawsuit and that the defendant will likely use altered documents in that lawsuit, is it proper under Title 28 U.S. Code Section 455 (a) and (b) for this judge to assume jurisdiction of this case?

(3) Assuming that the District Judge assumes jurisdiction of the case under the circumstances as set forth in question No. 2 does the judge have a duty to advise the defendants of the information he has obtained from the government or advise the defendants of their constitutional rights prior to their testifying in the case, and if the judge fails to do so, does that failure taint any criminal indictments arising out of defendants' actions or testimony in that case?

(4) Where some circuit courts have interpreted the sections proscribing obstruction of justice (Title 18 U.S. Code Section 1503) by limiting the conduct that violates this section to intimidating actions only, is it proper to convict a defendant for obstruction of justice for other

conduct in a circuit where the circuit court interprets the sections more liberally?

(5) Where a count of an indictment charges a defendant with obstruction of justice and the count refers to the conspiracy count of the indictment as constituting and describing some of the means by which the offense was committed and the same evidence was relied upon to prove the other count as well as the count of obstruction of justice, proof being offered by the government indiscriminately in all counts, was the petitioner's rights against double jeopardy as set forth in the Fifth Amendment of the United States Constitution infringed by the imposition of a separate sentence and/or fine on this count?

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IN THE SUPREME COURT OF THE UNITED STATES
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, BERNARD J. COVEN, respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on October 26, 1981, affirming a judgment of the United States District Court for the Southern District of New York convicting the petitioner of conspiracy, in violation of Title 18 United States Code Section 371; mail fraud in violation of Title 18 United States Code Section 1341; wire fraud in violation of Title 18 United States Code Section 1343; endeavor to obstruct justice in violation of Title 18 United States Code Section 1503; and

false declaration in violation of Title 18 United States Code Section 1623. Petitioner was convicted of 11 substantive counts all of which were alleged in the conspiracy count both as means of the conspiracy and as overt acts. Petitioner was sentenced to a term totaling 10 years and fines totaling $34,000, the petitioner to stand committed until such fine was paid. The trial was had before Carter, D.J., and a jury.

OPINION BELOW

The opinion of the United States Court of Appeals is annexed herein as Appendix "A."

JURISDICTION

The judgment of the aforesaid Court of Appeals was rendered and entered on October 26, 1981. A petition for rehearing en banc was denied on December 30, 1981.

The jurisdiction of this court is invoked under 28 U.S. Code Section 1254(1). The basis for federal jurisdiction in the United States District Court was the provision of Title 18 U.S. Code Section 371, 1341, 1343, 1503 and 1623.

STATUTES INVOLVED

The statutes involved are Title 18 U.S. Code Sections 371, 1341, 1343, 1503 and 1623, Title 28 U.S. Code 455.

The pertinent provisions of these statutes are set forth in Appendix "B" infra.

STATEMENT OF THE CASE

THE INDICTMENT

The indictment alleges that petitioner, Coven and his codefendant, JAMES F. O'CONNOR, who each owned a beneficial interest in Euro-Swiss International Corporation (Euro-Swiss) engaged in a variety of criminal acts designed to avoid paying monies allegedly owed by Euro-Swiss to companies controlled by a court appointed receiver. The indictment directs itself to the defendant's efforts to prevent the receiver from collecting any money judgment that might have eventually been entered against Euro-Swiss in a civil lawsuit that was started by the receiver against Euro-Swiss in order to collect these moneys. The charge of obstruction of justice and false declarations arise directly from this lawsuit. The "object," "means" and "overt acts" sections of the conspiracy count also arise in part from the lawsuit. The mail fraud and wire fraud counts alleged that the defendants siphoned off moneys from Euro Swiss to prevent the receiver from collecting any judgment he might obtain against Euro Swiss.

THE CIVIL PROCEEDINGS

From September 1978 until August 1979, Earl Wilt (Wilt) who was to become the government's principal witness at the trial, functioned as sole owner and president of Morgan, Harris & Scott, Ltd., Harrison Prescott, Inc. and Euro-American Currency Corporation. These corporations purchased commodity contracts from Euro-Swiss.

Under his direction, Wilt's corporations conducted large scale telephone sales operations designed to defraud members of the investing public through the sale of

spurious and misleading deferred delivery commodities contracts. Wilt did not resell Euro-Swiss Contracts. By their terms the contracts could not be resold.

On August 6, 1979, U.S. Postal Inspectors, pursuant to a search warrant, seized the books and records of Wilt's companies. Thereafter, on August 16, 1979, the Commodity Futures Trading Commission (CFTC) initiated a proceeding in the Southern District of New York seeking to enjoin Wilt's companies from conducting further business. It was in the course of these proceedings that the receiver, above mentioned was appointed. Later, the receiver commenced the civil action against Euro-Swiss.

INVOLVEMENT OF EARL WILT

On August 9, 1979, 3 days after the raid by the U.S. Postal Inspectors, Wilt entered into a cooperative agreement with the United States Attorney for the Southern District of New York pursuant to which Wilt was permitted to plead guilty to one count of mail fraud (18 USC 1341). In addition, Wilt agreed to plead guilty to one felony count and one misdemeanor count in State Court. As part of the agreement, Wilt became an informant for and agent of the Postal Inspection Service.

During September and October 1979, Wilt, at the direction of the Postal Inspection Service and equipped by the government with a hidden tape recorder, made frequent visits to the office of Euro-Swiss. Wilt falsely represented to the defendants that he was there to seek employment with Euro-Swiss, when in reality he was there to conduct a warrantless surveillance of the premises.

Wilt made recordings of conversations he had with the defendants, made recordings of conversations had by the defendants with other persons, conversations to which Wilt was not a party. In addition, the undercover agent, Wilt, "seized" documents by picking them up and reading their contents into the recorder.

The recordings made by Wilt were subsequently used by the government at the trial over the objection of counsel.

EX PARTE CONVERSATION BETWEEN TRIAL JUDGE OF CIVIL SUIT & PROSECUTION

On October 22, 1979, well before the institution of the Civil suit mentioned above and before it was referred to Judge Constance Baker Motley, a conference was held in the chambers of Judge Motley, among the Judge, the Assistant U.S. Attorney who later prosecuted the defendants, and the receiver. The purpose of the conference was to advise the judge that:

(A) The petitioner and his codefendant were targets of a criminal investigation.

(B) The cooperation of the receiver was enlisted in helping the government obtain information for use against the defendants, to which cooperation the judge consented.

(C) The petitioner intended to use an allegedly backdated customer agreement in an effort to prevent the receiver from recovering any money whatsoever from Euro-Swiss.

THE CIVIL LAWSUIT

Thereafter, on November 2, 1979, several days after the final tape recording was made and after the ex parte conference with the trial judge, a civil suit was commenced against Euro Swiss by the receiver in order to collect amounts allegedly owing by Euro Swiss to Wilt's companies, which were now being administered by the receiver. Simultaneously with the filing of the lawsuit, the receiver obtained an ex parte order of attachment from the judge. The receiver then moved to confirm the writ of attachment and Euro-Swiss cross-moved to vacate the writ.

Beginning on November 13, 1979 and continuing intermittently until November 28, 1979, Judge Motley held a preliminary hearing with respect to the provisional relief. These hearings were presided over by the very same judge who held the ex parte conferences with the Assistant U.S. Attorney and the receiver. Part of plaintiff's evidence was a tape recording provided by the government. At no time during the hearings, did Judge Motley reveal to the petitioners, the aforementioned conference. On November 28, 1979, at the conclusion of the hearing, the writ of attachment was confirmed. There never has been a plenary trial with respect to the issues of the lawsuit.

THE CRIMINAL TRIAL

The indictment alleged that customer agreements between Euro Swiss and Wilt's companies dated August 3, 1979 were actually signed by Wilt in October 1979 and that petitioner and his codefendant induced Wilt to back date them.[1] The indictment also alleged that petitioner made a false declaration under oath at the civil preliminary hearing by denying knowledge of the alleged back dating. The indictment further alleged that two Mexican Peso transactions were fabricated by the petitioner and his codefendant and that the books and records of Euro-Swiss introduced at the preliminary hearing of the civil suit had been altered to indicate the legitimacy of the peso transactions.

While preparing for trial, petitioner's counsel learned that certain portions of the transcript of the suit of *CFTC vs. Morgan Harris & Scott* had been sealed. Counsel moved, at a pre-trial conference before the trial court for an order unsealing the sealed portion of the transcript and making the material immediately available to the defendants. The trial court so ordered. The newly unsealed portion of the transcript contained the previously mentioned ex parte conference among the Assistant U.S. Attorney,

1. These events took place while Wilt was acting as a government agent.

the receiver and Judge Motley at the civil trial. The discovery of the transcript raised a number of crucial, troubling and unresolved questions which constitute novel question of first impression for this court, and contain matters which are likely to recur again which this court should resolve. Those questions were:

(A) What role did the United States Attorney's office play in the institution and prosecution of the receiver's civil suit? It was already noted that the United States Attorneys office loaned one of the Wilt tapes to the receiver.

(B) To what extent did the United States Attorney's Office control and/or participate in the receiver's litigation strategy for the purpose of gathering information for grand jury presentation?

(C) Were there any other communications among Judge Motley, the receiver and the Assistant U.S. Attorney other than the recorded conversation?

(D) Inasmuch as Judge Motley knew that the receiver was cooperating with the U.S. Attorney's Office in its criminal investigation of petitioner and his codefendant, were the petitioner and his codefendant entitled to receive from Judge Motley appropriate disclosure and/or constitutional warnings before they appeared and testified at the civil hearing?

(E) Did the defendants suffer any other constitutional deprivations? Was the conduct of Judge Motley, and the Assistant U.S. Attorney consistent with due process and fundamental fairness?

(F) To what extent was Judge Motley influenced by the ex parte conference with respect to her rulings on objections, her questioning of the defendants and her decision?

Thus, petitioner applied to the trial court, prior to the commencement of the trial for a full evidentiary hearing to endeavor to elicit information as to whether the defen-

dants' rights were so violated as to taint all or part of the indictment.

The trial court summarily denied petitioner's application. Furthermore, the trial court expressly prohibited counsel from inquiring, during the course of the trial, or in any cross examinations, into any of the questions that had been raised concerning the ex parte conference.

After trial, petitioner and his codefendant were convicted of all counts of the indictment and were sentenced as follows:

(1) On the conspiracy count, a five year prison sentence and a $10,000 committed fine

(2) A concurrent five year prison sentence and a $1,000.00 committed fine on each mail fraud count

(3) A concurrent five year prison sentence and a $1,000 committed fine on each wire fraud count

(4) A five year prison sentence consecutive to the other prison sentences and a $5,000 committed fine on the endeavor to obstruct justice count and

(5) A five year concurrent prison sentence and $10,000 committed fine on the false declaration count.

REASONS FOR ALLOWANCE OF WRIT

I

Warrantless surveillance by a government agent during which eavesdropping in conversations to which the agent was not a party in the offices of the petitioner and recording same coupled with the "seizure" of documents by reading them into the recorder was an unreasonable violation of the Fourth Amendment rights of the petitioner to the extent of making the evidence so garnered inadmissable.

Earl Wilt, as part of his cooperation agreement with the government, became a government agent for the U.S. Postal Inspection Service and, equipped with a recording device by the government, went to the offices of the petitioners on the pretext of seeking employment with the petitioner but in reality was there to gather information which might be useful to the government in preparing an indictment. Not only did he engage the petitioner and his codefendant in conversations which he recorded, but he also recorded conversations taking place in his presence but to which he was not a party. Furthermore, he picked up documents which were lying about in the petitioner's office and, without permission read their contents into the recorder thus effectively "seizing" these documents. All of the aforementioned activities of Wilt were conducted in the absence of a warrant. Wilt subsequently testified at the trial as a government witness.

The use of electronic surveillance where one party consents to the eavesdropping has been employed very widely since this court's decision in *United States v. White* 401 U.S. 745. The technique had been used previous thereto, but many law enforcement agencies apparently

look upon *White* as authorization for unlimited and untrammeled use of electronic surveillance.

The majority of this court in *White* reasoned that an undercover agent can write down and later testify to conversations with a defendant who is under surveillance. Furthermore, under *Lopez v. United States* 373 U.S. 747, they may transmit these conversations to other agents who have recording devices.

In the case at bar, the agent went even further. He recorded conversations to which he was not a party and also read the contents of documents into the recording device. These activities were not considered in *White.* However, *Katz v. United States,* 389 U.S. 347 would appear to be controlling. In *Katz* government agents, without a warrant, installed an electronic recording device to the outside of a public telephone booth where it was known that defendant Katz made telephone calls. The government argued that there could be no constitutional protection conferred upon a person speaking in a place as public as a phone booth. This court replied to this argument by stating

> "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Ibid 389 U.S. at 350, 351"

The reasonable expectations of privacy was the touchstone of the *Katz* decision. We could infer that a warrantless interception of a conversation intended to be private would be constitutionally protected. In the case at bar, the agent, Wilt, had gained access to the petitioner's office by false pretenses. He represented himself as seeking employment with petitioner's firm. Although it may be argued that by Wilt's admission to the premises, albeit under a false assumption by the petitioner, he then became

an invitee and thus all conversations and all events taking place before him and in his presence were subject to his recording and reporting them to the government agency by whom he was sent. There is argument against that proposition which will be set forth later on. However, at this point, assuming arguendo, that Wilt was "lawfully" in the premises, this did not give him the right to conduct a warrantless search of areas contemplated as private. Just as the public telephone booth in *Katz* was contemplated as a private area, so was the office of the petitioner and his desk where documents were placed. The mere placing of the documents in a room where the agent had come in does not give rise to the inference that he could rifle through them and record their contents. This is a far cry from an agent being shown a document and then reporting on it. In such an instance, one might invoke the misplaced confidence or assumption of the risk theory of *On Lee v. United States* 343 U.S. 747 and *Lopez v. United States* 373 U.S. 427. However, the act of an agent actually seizing documents in the manner that Wilt did in the case at bar is actually not contemplated by *On Lee* or *Lopez* or even *White.* Had the government procured a warrant to cover the eavesdropping activities of Wilt, it is doubtful that such a warrant, unless specifically providing therefor, would have covered the seizure of such documents.

The warrantless eavesdropping by Wilt of conversations to which he was not a party was not contemplated by *White* or the line of cases leading thereto. All these cases involved participant monitoring. Even in *White* the conversation was monitored and transmitted by a participant to the conversation.

Not so in the case at bar. Here, the recording of the conversations was made by one who listened in on telephone conversations made by the petitioner from the

confines of his office to other individuals, and in conversations taking place in petitioner's office between the petitioner and others. These conversations were private, just as the conversations made in the public telephone booths by Katz. These conversations were constitutionally protected. These conversations were not knowingly exposed to the public. In the absence of a warrant, these conversations may not be recorded.

It may be argued that only those who contemplate illegal activity must anticipate and risk warrantless surveillance. However, in the absence of a Fourth Amendment requirement of prior justification before a neutral magistrate for the issuance of a warrant, how can the evil be separated from the good without subjecting everyone to surveillance or leaving the selection to the uncontrolled discretion of government agents? This theory ultimately rests on the cynical conclusion that a warrantless surveillance will be justified by what it reveals. Thus, the end would justify the means.

In *Holmes v. Burr,* 486 F 2nd 55 (9th Cir. 1973), (Cert. denied) 414 U.S. 1116, Judge Huffstedler, in her dissent, sets forth a cogent argument indicating that destroying a right protected by the Fourth Amendment because of a distaste for the remedy, would ultimately destroy the Fourth Amendment:

> "Do the Fourth and Fourteenth Amendments circumscribe warrantless electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protection of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?"

The dissent stated later on:

> "Destroying a right protected by the Fourth Amendment because of distaste for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

Therefore, it is respectfully urged that the holding of the court in *White* did not confer upon the government the right to engage in warrantless seizure of documents or confer upon the government the right to engage in warrantless eavesdropping on non-consentual conversations. This court should clarify that fact and state this proposition unequivocally so that the limit of the government's rights to engage in electronic surveillance be known. All evidence gathered in violation of the Fourth Amendment rights of a party must be excluded. Thus, in the case at bar, the illegal fruits of Wilt's surveillance should have been excluded.

This court must give attention to the many questions that have arisen since the decision of *U.S. v. White* 401 U.S. 745 and set them to rest. As stated above government agents have looked upon *White* as giving them unlimited rights to engage in warrantless electronic surveillance. It must be pointed out that *White* was not a majority opinion of the court. The court's opinion was joined in by 4 justices. This opinion held that *Katz* did not apply to consenting recorded conversations with one who turned out to be a government agent or informer. The concurring opinion of Mr. Justice Brennan agreed with the result but stated that Katz did apply to such conversations and that all cases of electronic monitoring of third party conversations and face to face conversations between a government agent and a suspect must be preceded by a warrant. The concurrence in the result was predicated upon the fact that the conversation in *White* took place before the *Katz* decision and the holding of *Desist v. U.S.*, 394 U.S. 244 required that *Katz* applied only to those electronic

surveillances that occurred subsequent to the date of the Katz decision and thus, the rule of Katz could not be applied to *White*. Justices Douglas, Marshall and Harlan vigorously dissented arguing that *Katz* controlled the surveillance in question. Justice Black, whose vote would have been the deciding vote, concurred with the conclusion of the plurality, but on unrelated grounds, to wit, that conversations are not protected by the Fourth Amendment.

It is time for this court to reconsider the effect that warrantless surveillance by the government has upon our society and the withering away by the government of the Fourth Amendment rights of our citizens. As was aptly observed by Justice Harlan in his dissent in *White* 401 U.S. at 787-89:

> "Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third party bugging a prevalent practice, it might well smother that spontaneity—reflected and frivolous, impetuous, sacrilegious and defiant discourse—that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant."

While the plurality opinion stated that electronic recording produces more reliable evidence than human recollection, *White*, p. 753, this court must bear in mind that:

(1) Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive result. A recorder captures voices without facial expressions or gestures or other subtle details. However, reliability is not relevant. Evidence obtained by an illegal search must be excluded, not because of its unreliability, but because of our constitutional values, the exclusion seeks to protect.

(2) The government's legitimate interest in detecting and preventing crime must be balanced against the freedom of the individual from unjustified intrusions. The balance was struck by the framers of the Fourth Amendment when they wrote in the requirement of advance authorization of searches and seizures by a magistrate after a showing of probable cause.

(3) It should not be left to the uncontrolled discretion of government agents as to who should be monitored and who should not. By removing the requirement of antecedent court approval, that is what will happen.

(4) The end does not justify the means in our constitutional system. The law of the land and our constitution forbid it. There can be no rational system of concerns and values where the powers of the government to rifle one's drawers and tap one's telephone are restricted, but not its powers to infiltrate one's home with a legion of spies. (*Amsterdam, Perspective in the Fourth Amendment,* 58 Minn L. Rev. 349, 365).

Therefore, the court should now hold that all such warrantless eavesdropping is in derogation of the Fourth Amendment and should be suppressed and excluded.

II

After learning of the pending government investigation into criminal activity of the petitioner, the trial judge, who presided over the underlying civil cases should have disqualified herself from presiding over the civil hearing. Her failure to do so resulted in a violation of petitioner's rights of due process and of fundamental fairness. The government, with the cooperation of the receiver, used the civil case to create incriminating evidence. At least an evidentiary hearing at the criminal trial should have been conducted to determine the extent to which petitioner's rights were violated.

The rights to a fair and impartial judge who has not prejudged a case is guaranteed by the Due Process clause of the constitution. *United States v. Conforte* 457 F Supp. 641. As this court has stated, "to perform its high function in the best way justice must satisfy the appearance of justice" *Offutt v. United States* 348 U.S. 11. Congress has codified this proposition by enacting Title 28 U.S.C. sec. 455. This statute provides in part:

"(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;"

By its plain language, the statute established a purely objective test of determining whether a judge should be disqualified. Regardless of the judge's good faith or subjective views, if his impartiality "might reasonably be questioned," he must disqualify himself.

In the case at bar, prior to the civil lawsuit being started, the court appointed receiver for Wilt's companies together with the Assistant U.S. Attorney informed Judge Motley at an ex parte conference that the petitioner was the target of a criminal investigation; that the assistance of the receiver was being enlisted by the government to which Judge Motley consented; and that the petitioner would use fraudulently predated documents in order to frustrate the receiver's claim. Subsequently, the civil lawsuit was commenced by the receiver and assigned to Judge Motley who accepted the case.

It is contended that Judge Motley should have recused herself under 28 U.S.C. 455 (a) because her impartiality might reasonably have been questioned in light of the information disclosed to her by the Assistant U.S. Attorney. Even where the question is close, the judge whose impartiality might reasonably be questioned must recuse herself—*Potashnick v. Port City Construction Co.* 609 F.2d 1101 (5th Circuit) Congress was concerned with the appearance of impartiality to the general public.

"Subsection (a) of the amended section 455 contained the general, a catch-all, provision that a judge shall disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." This sets up an objective standard rather than the subjective standard set forth in the prior existing statute through the use of the phrase "in his opinion." This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." *H.R. Rep. No. 93-1453,* 93rd Congress 2nd Sess (1974).[1]

In light of the fact that the entire indictment concerns itself with the activity of the petitioner and his codefendant in trying to frustrate the civil claim of the receiver,

1. The concern of Congress for impartiality is reflected in a lead editorial of the New York Times of Feb. 18, 1982 quoting Sec. 455(a).

and in fact, the false statements count, and the obstruction of justice counts are a direct result of the above mentioned civil case it becomes vital to determine:

(1) Whether Judge Motley should have recused herself

(2) If she should have done so and did not, then what was the effect of her failure to do so on the due process rights of the petitioner in the subsequent criminal prosecution which prosecution was a direct result of the civil case.

It is submitted that the question of the effect of the failure of the judge in the civil case to recuse herself upon the constitutional rights of the petitioner is one of first impression and a novel one for this court.

When an Assistant U.S. Attorney comes before a judge, ex parte, and informs her that a private party who may soon appear before her (1) is under criminal investigation, (2) is trying to defraud a court-appointed receiver and (3) intends to introduce in court fabricated and backdated documents, even the most fair minded of judges could not help but be prejudiced against this private party. Even if the particular judge could somehow retain subjective impartiality, the judge still could not properly preside over a lawsuit involving that person under investigation without creating an overwhelming appearance of partiality; precisely the circumstances section 455 (a) was enacted to prevent. The plain language of the statute and its legislative history make it absolutely clear that the disqualification of Judge Motley was required. Cases construing the section and its predecessor have done so broadly requiring disqualification in cases far less compelling than the case at bar. See *SCA Services, Inc. v. Morgan* 557 F. 2nd 110 (7th Circuit), Re: *International Business Machine Corp.* 618 F 2nd 923 (2nd Circuit 1980). If a judge's failure to disqualify himself in a civil case justifies the extraordinary remedy of mandamus, failure to dis-

qualify oneself from presiding over a hearing which provides the backbone of a criminal prosecution justifies the dismissal of any resulting indictment. Ibid page 926.

It is abundantly clear that Judge Motley should have disqualified herself from the civil hearing in light of the provision of the statute. Even the trial court, in the course of the criminal trial of the petitioner acknowledged "an arguable case for the tainting of the civil proceeding" but concluded that "even if arguably Judge Motley had violated 455, it seems to me that it has nothing to do with this proceeding." The contrary is the case. The violation by Judge Motley of Sec. 455 had everything to do with the criminal prosecution. It has been pointed out that several of the counts of the indictment arose as a direct result of the tainted hearing. We will never know to what extent Judge Motley's questions and rulings were influenced by the prior knowledge given to her by the Assistant U.S. Attorney. We do know that the conference was never revealed to the petitioner or his codefendant by Judge Motley. We do know that petitioner, who was acting as attorney for defendant in the civil hearing, was permitted to testify without having been given appropriate constitutional warnings by the court. We do know that Judge Motley ordered depositions taken before the preliminary hearing to confirm the warrant of attachment; a most unusual procedure. We do know that during the criminal trial, the government's proof focused heavily on petitioner's conduct at the civil hearing. Aside from the tapes made by Wilt, the most dramatic evidence offered by the government involved lengthy dramatization by six readers of certain portions of the "civil" hearing. This dramatization may have so poisoned the jury's perception of petitioner's conduct that it could not objectively assess the evidence on the fraud counts. We do know that Wilt testified in behalf of the receiver at the civil hearing. We do know that the

government lent to the receiver, one of Wilt's tapes, a fruit of the criminal investigation, for use in the civil proceeding.

It is quite possible and indeed very likely that the indictment to which petitioner was convicted may never have been obtained had it not been for the tainted civil hearing. There is a direct relationship between the failure of Judge Motley to disqualify herself under 28 U.S.C. 455 and the indictment and conviction of the petitioner.

An over zealous prosecutor and an over eager district judge have utilized a civil hearing as a springboard for and an extension of the grand jury and as a device luring the petitioner into court for the purpose of extracting evidence upon which to premise an indictment.

In *Brown v. United States,* 245 F 2nd 549 (8th Circuit), the court dismissed an indictment because the defendant had been summoned before the grand jury for the sole purpose of extracting testimony upon which to premise a perjury indictment. The court held:

> "Extracting the testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt."

It is one thing to be brought before a grand jury for the purpose of eliciting testimony upon which to premise an indictment. It is improper and a serious violation of due process. It is far more horrendous to accomplish the same purpose by changing a "civil" hearing in a federal court into an area of the grand jury. When a target is called before a grand jury, he knows that a criminal investigation is progressing; he has an opportunity to consult with counsel and he is put on notice of his rights against self in-

crimination. In the "civil" hearing, petitioner was propelled into court by an ex parte writ of attachment, received no warning, had no opportunity to consult with independent counsel and had no reason to consider invoking his privileges. Petitioner was improperly subjected to all the risks of a grand jury appearance, with the full knowledge and approval of the presiding judge and without benefit of the protection.

The transcript of the ex parte conference was sealed and it was not until the "eve" of trial that petitioner learned of the existence of the sealed transcript and then requested its unsealing and delivery to him. It was at that point that petitioner learned of the conference and then raised the question of the impropriety of Judge Motley's action and requested an evidentiary hearing to explore the nature and extent of any judicial or prosecutorial misconduct.

Petitioner's rights to due process and to fundamental fairness were violated.

Such conduct justifies the dismissal of the indictment. Although this court has not considered that proposition before with respect to Title 28 U.S.C. 455, it is submitted that it is well established that to deter improper conduct by law enforcement officials, evidence stemming from an illegal search and seizure should be suppressed as a "fruit of a poisonous tree." Likewise, the judiciary should exclude evidence gathered as a result of the kind of enterprenurial prosecution and judicial collaboration that occurred here. Unless the courts are willing to do so, the government will have incentive to manipulate other civil proceedings and judges will have incentive to improperly cooperate with law enforcement agents.

III

Some circuit courts have interpreted the sections proscribing obstruction of justice Title 18 U.S. Code Section 1503 by limiting the conduct that violates this section to intimidating actions only. Whereas, in the circuit in which petitioner was convicted, the section is construed more liberally thus violating the petitioner's rights of equal protection of the law.

Title 18 U.S. Code Section 1503 provides in part . . . "Corruptly or by threats or force or by any threatening letter or communication influences obstructs or impedes or endeavors to influence obstruct or impede the due administration of justice, shall be fined not more than $5,000.00 or imprisoned not more than five years or both."

The second circuit in the case of *U.S. v. Weiss,* 491 F 2nd 460 (1974) (certiorari denied) held that an accused had corruptly endeavored to obstruct justice within the purview of the above mentioned statute by failing to produce documents that he was commanded to produce by subpoena issued by the grand jury, which grand jury was investigating an alleged fraudulent scheme. Although the accused contended that the indictment was insufficient for failure to more specifically allege the conduct by which the accused had endeavored to obstruct justice, the court, nevertheless, held that such conduct in a liberal construction of the statute was sufficient to constitute obstruction of justice. Likewise, it was held in the case at bar by the Second Circuit in the appeal of the petitioner, that the petitioner's conduct in submitting falsified documents, constituted corruptly obstructing justice.

However, in a western circuit, particularly in the case of *United States v. Metcalf* 435 F 2nd 754 (1970), it was held that the term due administration of justice in this sec-

tion (18 U.S.C. 1503) proscribing obstructing due administration of justice is limited to pending judicial proceedings; the manner in which this section may be violated is *limited to intimidating actions.* (Emphasis added). On the other hand, *United States v. Cohn,* decided in the second circuit 452 F 2nd 881, held that defendant's concealment of information relevant and germain to grand jury's functions would support a conviction for obstructing justice.

It would thus appear from a quick reading of the different cases decided in the various circuits that depending on where an accused resided or where the alleged acts were committed would be the crime for which he was charged.

If the petitioner had performed his acts or resided in one of the western states, then he would not have been charged or convicted properly of the offense of obstruction of justice because there are no threats or violence used or employed as a means by the petitioner or his codefendant.

However, in the second circuit, where the petitioner was tried and convicted of this offense, it has been held that the petitioner's conduct would constitute obstruction of justice.

It is a denial of equal protection of the law for conduct to be considered a crime in one part of the country and not considered a crime in another part of the country.

Therefore, it is encumbent upon this court to resolve the conflicts among the circuits and finally put to rest, the issue of what conduct does constitute obstruction of justice.

IV

The same evidence was used to prove the count of obstruction of justice as was used to prove the conspiracy count of the indictment. Proof was offered by the government indiscriminately on all counts. A separate sentence and fine on this count is repugnant to the petitioner's rights against double jeopardy.

Count 11 of the indictment read in part as follows:

"The grand jury further charges:

(18) From, in or around August 1979, up to and including the date of the filing of this indictment—defendants—unlawfully, wilfully and knowingly, did corruptly endeavor to influence, obstruct and impede the due administration of justice in connection with the case of *Glusband v. Euro-Swiss International Corporation.*

(19) The allegations contained in paragraphs 1 through 15 of Count One of this Indictment (The Conspiracy Count) are hereby repeated and realleged as constituting and describing some of the means by which the defendants committed the offense charged in Count 11." (Parenthetical material added)

During the course of the trial, the government offered proof indiscriminately on all counts of the indictment and did not offer separate and distinct proof for the substantive count of obstruction of justice. Petitioner received a separate sentence and fine for this count.

The Double Jeopardy Clause of the Fifth Amendment states that no person be subject for the same offense to be twice put in jeopardy of life and limb. This protects defendants not only against a second trial for the same offense, but against double punishment for the same offense *North Carolina v. Pearce* 395 U.S. 711.

Blockburger v. U.S. 284 U.S. 299 lays down the controlling rule for determining whether prohibited double punishment is being imposed for the same offense. The

applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an act which the other does not.

The 11th count of the indictment, which charges obstruction of justice, alleges no new acts by the defendants but incorporates by reference the acts set forth in the conspiracy count. The proof offered by the government to sustain the substantive count would be the same proof to uphold the conspiracy charge. The prohibition in the constitution against placing an accused twice in jeopardy for the same offense is directed at the actual "offense" with which he is charged and not only at the violated statutes. The constitution does not permit convictions for the same "offense" if they are charged under different statutes even though violations of the two statutes would normally not constitute double jeopardy. In the case at bar, it would be difficult, if not impossible to weed out any item of evidence that was not pertinent to both the conspiracy and the substantive count.

In *United States v. Austin* (6th Circuit 1976), 529 F 2nd 559, the court remanded the case with instructions to vacate or set aside a sentence imposed upon the conspiracy count, saying:

> "our examination of the record persuades us that essentially the same evidence in this case was relied upon to prove both the conspiracy count and the substantive offenses. The proof was offered indiscriminately on all three counts and it would be difficult, if not impossible, to weed out any item of evidence that was not pertinent to all counts. The overt acts in the fourth count were all relevant in serv-

ing the substantive offenses as well as the conspiracy" (p. 563).[1]

The court concluded that the appellant was doubly punished "in violation of the Fifth Amendment" (p. 564). This conclusion is equally applicable to the petitioner in the case at bar.

"It seems beyond argument that the appropriate sentence and the number of years for which a man shall be punished for an offense is not rationally a function of the number of statutory violations into which his conduct may be passed by a clever pleader." *Working Papers of the National Commission on Reform of Federal Criminal Laws* (July 1970) p. 341.

CONCLUSION

This case is one wherein the petitioner has been convicted and sentenced under circumstances indicative of deviation from established law. It is further clear that the within application presents meritorious, novel and certainly arguable questions of a kind likely to arise again and which call for authoritative disposition. There are instances where there is a conflict of opinion among the Courts of Appeal. This petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this court; that the determination, order and judgment of the said

1. The Indictment in the *Austin* case was similar in form to the one in the case at bar. The Court held that the substantive count merged with the conspiracy count for the purposes of sentencing because of the concert of action. See also *U.S. v. Finazzo*, 520 F Supp 1085 (E.D. Mich. S.D. 1981), *U.S. v. Fife* 573 F2d 369 (6th Circuit 1976).

Court of Appeals may be reversed and that petitioner be granted such other, further and different relief as may seem proper.

Dated: New York, New York
February 18, 1982

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Appendix

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 127, 128, 129—September Term, 1981
(Argued: September 14, 1981 Decided: October 26, 1981)
Docket Nos. 81-1106, 81-1120, 81-1122

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

BERNARD J. COVEN and JAMES F. O'CONNOR,

Defendants-Appellants.

Before:

OAKES and MESKILL, *Circuit Judges,* and
BLUMENFELD, *District Judge.**

Appeals from judgments entered after a jury trial in the United States District Court for the Southern District of New York, Robert L. Carter, *Judge*, convicting appellants of conspiracy, mail fraud, wire fraud, obstruction of justice and false declaration.

Affirmed.

MILTON S. GOULD, New York, New York (Robert Gold, Jonathan C. Thau, Shea & Gould, New York, New York, of counsel), *for Appellant Coven*

IRVING ANOLIK, New York, New York, *for Appellant O'Connor*

AUDREY STRAUSS, Assistant United States Attorney, Southern District of New York, New York, New York (John S. Martin, Jr., United States Attorney, Robert Schwartz, Assistant United States Attorney, Southern District of New York, New York, New York, of counsel), *for the Appellee*

MESKILL, *Circuit Judge:*

James F. O'Connor and Bernard J. Coven appeal from judgments of the United States District Court for the Southern District of New York, Carter, J., entered after a trial by jury convicting each of one count of conspiracy, 18 U.S.C. §371 (1976); eight counts of mail fraud, 18 U.S.C. §§ 1341-2 (1976); one count of wire fraud, 18 U.S.C. §§ 1342-43 (1976); and one count of obstruction of justice, 18 U.S.C. § 1503 (Supp. III 1979). In addition, Coven was convicted of one count, and O'Connor of two counts of false declaration, 18 U.S.C. §1623 (1976 & Supp. III 1979). The district court sentenced both appellants to ten years imprisonment[1] and imposed the maximum committed fine as to each count, totalling $34,000 as to Coven and $44,000 as to O'Connor. We affirm.

BACKGROUND

Coven and O'Connor owned beneficial interests in Euro-Swiss International Corporation ("Euro-Swiss"), a company which sold commodities contracts to retail operations which in turn sold similar contracts to the

public. Coven, an attorney, was counsel to Euro-Swiss. The company operated out of Coven's New York law offices.

Euro-Swiss sold "deferred delivery" contracts for various commodities such as gold, silver and currencies. While these contracts gave the purchaser the right to obtain delivery of a particular commodity at a set price on a specified date, delivery was rarely, if ever, demanded. Instead, Euro-Swiss would liquidate the contracts by paying to the purchaser the equity value—the excess of the market price of the commodity over the contract price—on the date set for delivery. Thus, if the market price of the commodity exceeded the contract price on the delivery date, the contract would yield a profit to the purchaser. If the market price on the delivery date was lower than the contract price, the purchaser simply would forego his option to exercise his rights under the contract and the value paid for the contract would be profit to the seller.

Morgan Harris & Scott, Ltd. ("MHS"), and later, Harrison Prescott, Inc. ("HP") were major customers of Euro-Swiss. These companies, both owned and operated by one Earl Wilt, were so-called "boiler room" operations which used high pressure telephone sales and other tactics to induce the public to purchase contracts for the deferred delivery of commodities.[2] MHS and HP "covered" these "retail" contracts by purchasing similar "wholesale" contracts from Euro-Swiss.

In early August 1979, the United States Postal Inspectors executed a warrant to search the premises of MHS and HP, seizing the companies' books and records and effectively shutting them down. Later that month, the Commodity Futures Trading Commission ("CFTC") filed a complaint seeking to enjoin MHS and HP from conducting further business and to have a receiver appointed. District Judge Constance B. Motley appointed Steven J. Glusband as receiver on September 28, 1979.

During the period between the execution of the search warrant by the Postal Inspectors and the commencement of suit by the CFTC, Earl Wilt agreed to plead guilty to one count of mail fraud and to various violations of state law, and to cooperate with the government in its investigation of Euro-Swiss.

When MHS and HP were shut down, they had several outstanding contracts with Euro-Swiss. As these contracts matured, Euro-Swiss became obligated to pay substantial sums of money to MHS and HP and, therefore, to the receiver. In an attempt to avoid paying these sums, Coven and O'Connor embarked [illegible] course of action designed to defraud the [illegible] and the receiver by transferring Euro-Swiss funds to out-of-state and personal accounts, executing and backdating a fraudulent customer agreement between Euro-Swiss and the receiver's companies, altering the books and records of Euro-Swiss to reflect fabricated transactions and giving false testimony at an attachment proceeding instituted by the receiver against Euro-Swiss.

The government's evidence included the testimony of several witnesses, tape recordings made by Earl Wilt during visits to Euro-Swiss' offices and during telephone conversations after he had agreed to cooperate with the government, books and records of Euro-Swiss and portions of the transcript of the attachment proceeding before Judge Motley. On these appeals Coven and O'Connor challenge not only the rulings of District Judge Carter at the criminal trial but also the prior conduct of District Judge Motley and the government preceding and during a civil attachment hearing.

DISCUSSION

I. The Recusal Claim

Before we address the allegations relating to the criminal trial we first examine the earlier proceedings before Judge Motley which appellants claim taint the subsequent criminal trial, thereby requiring reversal.

Appellants strenuously argue that the civil attachment proceeding, out of which some of the criminal charges and some of the evidence presented in the criminal trial grew, was invalid due to Judge Motley's failure to recuse herself under 28 U.S.C. § 455.[3] This invalidity, they contend, tainted the subsequent criminal proceedings before Judge Carter. Appellants claim that Judge Motley obtained "personal knowledge of disputed evidentiary facts" and was therefore required to recuse herself from the attachment proceeding. According to appellants, Judge Motley's "pre-knowledge" of evidence relating to facts disputed in the proceeding created a situation in which her "impartiality might reasonably be questioned." This allegedly disqualifying "pre-knowledge" was obtained when Assistant United States Attorney Audrey Strauss, who subsequently prosecuted the criminal case, approached Judge Motley asking that Glusband, the receiver, be permitted to cooperate in a criminal investigation of Coven and O'Connor. Strauss told Judge Motley that Earl Wilt, while cooperating with the government, had obtained evidence that Coven and O'Connor had attempted to defraud the receiver by showing him records of fictitious orders from MHS to Euro-Swiss for which MHS had not paid, and by producing a fraudulent, backdated customer agreement between MHS and Euro-Swiss. These documents, if genuine, would have demonstrated that Euro-Swiss did not owe money to MHS under the maturing contracts. Judge

Motley permitted Glusband to report to the government on any meetings with Coven and O'Connor in the course of his duties as receiver, but warned that Glusband should inform the court of any conflict that might develop between his duties as receiver and his cooperation with the criminal investigation.

A few weeks later, Glusband filed a complaint against Euro-Swiss and obtained an *ex parte* order attaching Euro-Swiss' assets. Glusband moved to confirm the order, and Euro-Swiss cross-moved for an order vacating the attachment. Judge Motley scheduled the matter for an immediate hearing after which she denied the motion to vacate the attachment. Appellants argue here as they did before Judge Carter that Judge Motley's prior knowledge of evidence received from Strauss relating to attempts to defraud Glusband required the Judge to recuse herself from presiding over this hearing.

Section 455(b)(1) requires recusal when a judge has "personal knowledge of disputed evidentiary facts concerning the proceeding . . . . " The term "personal" was carried over from 28 U.S.C. §144 when section 455 was amended in 1974. Pub. L. No. 93-512, 88 Stat. 1609. This amendment to section 455 was intended to make the statutory standards for judicial disqualification consistent with those set forth in Canon 3C of the ABA Code of Judicial Conduct. *See* H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351. The ABA Code was adopted in 1972 in the light of a long line of cases holding that "personal" as used in section 144 means "extrajudicial." Knowledge acquired by the judge while he performs judicial duties does not constitute grounds for disqualification. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir.), *cert. denied*, 429 U.S. 998 (1976). There is no indication in the ABA Code, the accompanying commentary, or the legislative history

of section 455 that this earlier judicial interpretation of "personal" was disapproved. Against this background it is clear that by amending section 455 Congress intended to transfer the extrajudicial bias limitation contained in section 144 to section 455(b)(1). Information or knowledge possessed by a judge must stem from an extrajudicial source to warrant disqualification. *In re International Business Machines Corp.,* 618 F.2d 923, 927-28 (2d Cir. 1980); *United States v. Wolfson,* 558 F.2d 59, 62-63 (2d Cir. 1977).

In this case, the information in question was obtained by Judge Motley when the government sought her approval of an agreement by a receiver she had appointed to cooperate in a criminal investigation. It was clearly within her judicial responsibilities to be informed of proposed activities that might impair the receiver's ability to perform his duties properly. Therefore, Judge Motley was not required to recuse herself under 28 U.S.C. §455(b)(1).

Appellants also claim that recusal was required under 28 U.S.C. §455(a), asserting that Judge Motley's impartiality in the attachment proceeding "might reasonably be questioned" because of her familiarity with matters in dispute. Section 455(a) does not contain the term "personal" found in section 455(b)(1). Thus, it has been asserted that this section does not contain the requirement that to be disqualifying bias must spring from an extrajudicial source. *See* Note, *Disqualification of Federal Judges for Bias or Prejudice,* 45 U. Chi. L. Rev. 236, 254-57 (1978). As this Court has said in the past,

> We recognize that § 455(a) is designed to negate the "duty to sit" notion and to allow "a greater flexibility in determining whether disqualification is warranted in particular situations." *United States v. Ritter,* 540 F.2d 459, 462 (10th Cir. 1976), cert. denied, 429 U.S. 951, 97 S. Ct. 370, 50 L.Ed. 2d 319 (1976). Also, we do not read the

> authorities [interpreting "personal" as "extrajudicial"] as holding that a judge's conduct of proceedings before him can never form a basis for finding bias.

United States v. Wolfson, F. 2nd at 63 (footnote omitted).

However, under section 455(a) considerations, the fact that Judge Motley came upon the allegedly prejudicial information in her judicial rather than personal capacity, even if not dispositive, is relevant to an analysis of the appearance of impartiality. *See In re International Business Machines Corp.,* 618 F.2d at 929; *United States v. Daley,* 564 F.2d 645, 651-52 (2d Cir. 1977), *cert. denied,* 435 U.S. 933 (1978). In *Wolfson,* this Court held that section 455(a) did not require a judge to recuse himself from *coram nobis* proceedings which touched on activities at two trials over which he presided. The court said:

> We understand that regardless of a court's fairness, a defendant who has undergone two lengthy trials before the same judge, both of which ended in guilty convictions, may come to consider that judge as biased against him. These suspicions are understandable, but, without more, they do not provide a reasonable basis for questioning a judge's impartiality.

558 F.2d at 64. *See also, In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 964-65 (5th Cir.), *cert. denied,* 101 S. Ct. 244 (1980); *United States v. Schreiber,* 599 F.2d 534, 535-37 (3d Cir.). *cert. denied,* 444 U.S. 843 (1979); *United States v. Cowden,* 545 F.2d 257, 265-66 (1st Cir. 1976), *cert. denied,* 430 U.S. 909 (1977).

In the instant case, appellants claim that Judge Motley's prior knowledge of evidence relevant to the attachment hearing rendered her impartiality reasonably questionable. We disagree. Certainly, her prior knowledge was no more extensive than that of the trial judge in *Wolfson,* and there is no other basis in the record for questioning her ability to be fair and impartial.[4] Judge Motley's actions were wholly proper and in accord with the law.

II. Improprieties in the Civil Proceedings

Appellants claim that the government may have used the civil proceedings to "create" incriminating evidence for use at the criminal trial. They note that the government's criminal investigation had begun by the time the early stages of the civil proceedings were underway and that several parties to the civil case were actively cooperating with the government throughout the receivership and attachment proceedings. Appellants assert that they are entitled at least to an evidentiary hearing to determine whether the government manipulated the civil case to create criminal charges and supporting evidence. To buttress this claim, Coven directs our attention to cases in which perjury indictments have been invalidated on the ground that the perjurious testimony was given before improperly convened grand juries or other incompetent tribunals. *E.g., Brown v. United States,* 245 F.2d 549 (8th Cir.. 1957); *United States v. Icardi,* 140 F. Supp. 383 (D.D.C. 1956). Coven also cites decisions which held that the government, purporting to be investigating civil matters, used improper investigatory techniques or civil discovery mechanisms to obtain otherwise unavailable evidence for use in criminal prosecutions. *E.g., United States v. Parrott,* 248 F. Supp. 196 (D.D.C. 1965); *United States v. Guerrina,* 112 F. Supp. 126 (E.D. Pa. 1953). These cases do not support appellants' position.

The civil proceedings conducted by receiver Glusband, as well as the preliminary proceedings conducted prior to his appointment, were begun for the legitimate purpose of recovering money owed to MHS and HP. It is clear that Judge Motley had jurisdiction over this matter. Therefore, the "incompetent tribunal" cases are inapposite. Moreover, we find no evidence that the government used civil discovery mechanisms or otherwise duped

appellants into producing incriminating evidence by representing falsely that it was exploring a civil matter. Thus, *Parrott* and *Guerrina* do not help appellants.[5]

The record in this case reveals that a legitimate civil action was brought by the receiver against a company controlled by Coven and O'Connor. In an attempt to refute legitimate claims, Coven and O'Connor presented fraudulent documents to the court and testified falsely at an attachment hearing. That the government, aware that Coven and O'Connor might attempt to defraud the civil tribunal, monitored the civil proceeding intending to prosecute any noted criminal violations does not transform the attachment proceeding into a sham conducted merely to create criminal charges.

III. Confrontation Claims

A. The limitation on Repetitious Cross-Examination

O'Connor claims that his right to cross-examine witnesses against him was denied when the trial court refused to allow his lawyer to repeat questions already asked or to explore areas already covered by Coven's cross-examination. Federal Rule of Evidence 611(a) permits the trial court to "exercise reasonable control over the mode and order of interrogating witnesses" in order to "make the interrogation . . . effective for the ascertainment of the truth to avoid needless consumption of time. . . ." While the trial court's discretion to curtail cross-examination is limited by the Sixth Amendment, *Smith v. Illinois,* 390 U.S. 129 (1968), we do not believe that the limit was reached in this case.

The trial court cut short the questioning by O'Connor's lawyer several times, but reminded defense counsel frequently that he would be permitted to expand upon or delve more deeply into areas covered during Coven's

cross-examination. O'Connor's lawyer was prevented only from asking the same questions that Coven's lawyer had asked. The trial court's ruling here was reasonable and did not preclude O'Connor from effectively cross-examining witnesses. *See United States v. Praetorius,* 622 F.2d 1054, 1061 (2d Cir. 1979), 2cert. denied sub nom. United States v. Lebel, 449 U.S. 860 (1980).

B. Interview of Agent Livertucci

Judge Carter, in the presence of the prosecutor but not of the defense counsel, questioned IRS Agent Livertucci, who had interviewed Earl Wilt, to determine whether the IRS possessed any material subject to production under the Jencks Act, 18 U.S.C. § 3500 (1976). Appellants claim that this *in camera* interview violated their right to confront witnesses against them.

However, Agent Livertucci was never called as a witness against Coven and O'Connor and therefore no Sixth Amendment confrontation rights were implicated. *United States ex rel. Meadows v. New York,* 426 F.2d 1176, 1184 (2d Cir. 1970), *cert. denied,* 401 U.S. 941 (1971). Furthermore, an *in camera* interview is expressly authorized by 18 U.S.C. § 3500(c), and neither Coven nor O'Connor objected when the court announced its intention to conduct such an interview. Also, we have examined the materials turned over to the court by Agent Livertucci, and they contain absolutely nothing that the government was required to produce under either the Jencks Act or under *Brady v. Maryland,* 373 U.S. 83 (1963). The trial court did not err in its handling of Agent Livertucci.

C. Earl Wilt's Attorney-Client Privilege

Appellants also assert that their right of confrontation was denied when Earl Wilt was permitted to invoke

the attorney-client privilege when questioned about conversations he had with his lawyers concerning his cooperation agreement with the government. Appellants claim that these questions were relevant to Wilt's state of mind or motivation when signing the agreement and, therefore, to his bias.

It is clear that government witnesses have a right to assert the attorney-client privilege on cross-examination. *E.g., United States v. Sindona,* 636 F.2d 792, 804-05 (2d Cir. 1980), *cert. denied,* 49 U.S.L.W. 3788 (U.S. Apr. 21, 1981). However, where assertion of the privilege unduly restricts a defendant's cross-examination, the witness' direct testimony may have to be stricken. *See Dunbar v. Harris,* 612 F.2d 690 (2d Cir. 1979) (cross-examination limited by witness' assertion of privilege against self-incrimination); *United States v. Cardillo,* 316 F.2d 606 (2d Cir.), *cert. denied,* 375 U.S. 882 (1963) (cross-examination limited by witness' assertion of privilege against self-incrimination). In this case, however, Wilt's state of mind when signing the cooperation agreement was a collateral matter going only to Wilt's general credibility. Therefore Wilt's assertion of the attorney-client privilege did not deprive appellants of their constitutional right to confrontation. *See Dunbar v. Harris,* 612 F.2d at 692-93; *United States v. Cardillo,* 316 F.2d at 611. Moreover, appellants conducted an extensive cross-examination of Wilt which included direct questions about his state of mind when signing the agreement. Wilt's possible bias was readily ascertainable by the jury. Therefore, even if the trial court's ruling were erroneous, the error would have been harmless.

D. The White Powder

Appellants' final confrontation clause claim is that they were not allowed to explore significantly the origin

and content of certain "white powder" found in the offices of MHS and HP. This claim is groundless. Appellants were permitted to investigate the circumstances surrounding the discovery of the powder and the action of the government with respect to it. They were precluded only from asking questions about Wilt's use of drugs—questions for which they showed no reasonable basis.

IV. The Government's Summation

Appellants claim that the government in its summation improperly commented on appellants' failure to call a particular witness, that the prosecutor made other improper comments including the suggestion that the missing witness would have damaged the defendant's case, and that the prosecutor implied to the jury that she had personal knowledge of facts prejudicial to appellants which were not in evidence.

It is well established that the government may comment on the failure of a defendant to refute government evidence or to support his own claims.

> A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury "naturally and necessarily" would interpret the summation as comment on the failure of the accused to testify.

United States v. Bubar, 567 F.2d 192, 199 (2d Cir.), *cert. denied,* 434 U.S. 872 (1977). *See United States v. Sindona,* 636 F.2d 792, 805-07 (2d Cir. 1980), *cert. denied,* 49 U.S.L.W. 3788 (U.S. Apr. 21, 1981); *United States v. Barnes,* 604 F.2d 121, 148 (2d Cir. 1979), *cert. denied,* 446 U.S. 907 (1980); *United States v. Rodriguez,* 556 F.2d 638, 641-42 (2d Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978). In the instant case, the prosecutor commented on the

failure of appellants to call Harriet Gilmore, a Euro-Swiss employee, to ask if she had altered a Euro-Swiss ledger which the prosecution charged contained entries of fictitious transactions added to the ledger long after the transactions were claimed to have occurred. Appellants called another Euro-Swiss employee, Joan Werring, who testified that she had not altered the ledger, apparently attempting to support the defendants' claim that the challenged entries were genuine. The prosecutor's summation pointed out the absurdity of calling Werring instead of Gilmore to testify about the challenged entries when uncontradicted evidence showed that the entries were in Gilmore's handwriting.[6] This statement clearly cannot be construed as a comment on the defendant's failure to testify.

On rebuttal, the prosecutor asserted that "the law does permit me to make" the argument that the jury could infer that appellants' failure to call Harriet Gilmore was due to their fear of damaging information that Gilmore would have supplied, and that if this argument were improper, defense counsel's objection to it "would have been sustained." These assertions were made in response to defense counsel's closing statement which suggested that the prosecutor was acting improperly when she commented on appellants' failure to call Gilmore and that the prosecutor "knows better."[7] The government certainly was entitled to respond to such an accusation. *See United States v. Sindona,* 636 F.2d at 807; *United States v. Praetorius,* 622 F.2d at 1060-61; *United States v. Stassi,* 544 F.2d 579, 585 (2d Cir. 1976), *cert. denied,* 430 U.S. 907 (1977).

Finally, appellants claim that the prosecutor implied personal knowledge of facts and was "testifying" during summation. A review of the transcript demonstrates that this claim is wholly unfounded. The only comment that arguably comes even close to being improper is the pro-

secutor's statement that had the defendants called Harriet Gilmore to testify, her testimony "would have buried" them. However, when viewed in the context of the entire summation, *United States v. Sindona,* 636 F.2d at 806; *United States v. Williams,* 583 F.2d 1144 (2d Cir. 1978), *cert. denied,* 439 U.S. 1117 (1979), this comment is clearly seen as a suggestion of a permissible inference for the jury to draw rather than a statement of personal knowledge of what Gilmore would have said.

V. Jury Instructions

Appellants claim that they were prejudiced by the trial court's jury charge on the conspiracy count which referred several times to "two or more" conspirators when the conspiracy charged involved only Coven and O'Connor. Appellants contend that this charge invited the jury to "speculate about the existence of multiple conspiracies" and left "the basis for the jury's verdict . . . totally unclear. . . . " Brief for Appellant Coven at 45. Appellants concede that the "two or more" language was contained in their own requests to charge, but argue that the requests were prepared long before the close of the trial in reliance on the government's bill of particulars which alleged that there were several other conspirators.

We are unpersuaded by appellants' arguments on this point. The jury charge paralleled the language of the conspiracy statute, 18 U.S.C. §371. Moreover, the trial judge specifically charged that should the jury find either Coven or O'Connor not guilty of conspiracy, it must acquit both. The reference to two or more conspirators was, at most, harmless error.

VI. Fourth Amendment Claim

Appellants argue that their Fourth Amendment rights were violated when government informant Wilt surreptitiously recorded conversations conducted in his presence but to which he was not a party, and read into the tape recorder the contents of various Euro-Swiss documents. These recordings were made after Wilt signed a cooperation agreement with the government and went to Coven and O'Connor claiming to seek employment. This claim is without merit.

Appellants first question the vitality of *United States v. White*, 401 U.S. 745 (1971), which permitted the use of tape recordings of conversations between a government agent and the defendant to be used as evidence in the defendant's criminal trial. *White* has not been overruled and we are unquestionably bound by it.[8] However, appellants claim that *White*, even if binding, extends only to conversations to which the government agent was a party, not to statements merely made in his presence nor to documents within his view.

This claim is controlled by *United States v. Girard*, 601 F.2d 69, 72 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979), which held that the introduction into evidence of a tape recording of conversations conducted in the presence of a government agent did not violate the Fourth Amendment even though the agent was not a party to all of the conversations recorded. The *Girard* panel reasoned that the defendant had no reasonable expectation of privacy that would preclude the government agent, who was in the room with the defendant's permission, from testifying about what he was able to hear. Therefore, the defendant could not complain because the agent recorded his statements. *Girard* forecloses appellants' claim that Wilt's recording of conversations to which he was not a party violates the Fourth Amendment.

Given *Girard,* appellants' claim that reading the contents of documents into the tape recorder violated the Fourth Amendment must also fail. Coven and O'Connor had no expectation of privacy protected by the Fourth Amendment with respect to documents that they gave to Wilt or that were within his view when he was in the offices of Euro-Swiss with appellants' permission. Since Wilt could have testified to the contents of the documents without violating appellants' Fourth Amendment rights, he could also read their contents into a tape recorder.

VII. Harriet Gilmore's Civil Court Testimony

Appellants claim that the government misled both the trial court and appellants by stating in its bill of particulars that Harriet Gilmore, an employee of Euro-Swiss who allegedly made fraudulent entries in a Euro-Swiss ledger, was an unindicted co-conspirator, but abandoning this claim after trial. Appellants assert that as a result of this claimed ruse;, they failed to object to the government's reading into the record of portions of Gilmore's civil court testimony, believing that this testimony was hearsay, but within the co-conspirator exception to the hearsay rule. They claim that if Gilmore was not shown to be a co-conspirator, this testimony was inadmissible.

The short answer to this claim is that the evidence in question is not hearsay because it was not offered for the truth of the matters asserted. *See* Fed. R. Evid. 801(c). The evidence was a portion of the transcript of the attachment hearing during which Coven called Gilmore to provide a foundation for the introduction of the altered Euro-Swiss ledger which he used in an attempt to defeat the order of attachment. Thus, the transcript was read into the record in the criminal trial not for the truth of Gilmore's statements, but as direct evidence of Coven's act of obstruction of justice.

VIII. The Conspiracy Count

Appellants argue that the conspiracy count is legally insufficient because it charges a conspiracy to obstruct justice beginning in September 1979, more than a month before the filing of the civil lawsuit that was the target of the obstruction. We find no merit in this claim. The government alleged as objects of the conspiracy not only the obstruction of justice in the civil suit, but also attempts to avoid paying sums owed to MHS and attempts to defraud the receiver. The jury could well have found on this record that the conspiracy began long before the receiver filed suit in November.

Appellants also claim that the trial court erred in refusing to allow them to introduce court papers from a state court suit involving government informant Wilt but not Coven or O'Connor. These papers had been marked Coven's Exhibit S for identification. Appellants assert that this evidence would have cast doubt on government claims that O'Connor and Wilt, in referring to a "receiver" in a recorded conversation on September 5, 1979, were referring to a receiver that they anticipated would be appointed for MHS and HP. Coven and O'Connor contend that the court papers in Exhibit S would have shown that Wilt and O'Connor may have been referring to a receiver in Wilt's other lawsuit. Since the government used the September 5 tape as evidence that the Coven-O'Connor conspiracy began by early September, appellants claim that Exhibit S was highly relevant for the purpose of defeating the conspiracy count.

After examining Exhibit S, we feel that its usefulness for the purpose now asserted by appellants is doubtful. Furthermore, this purpose was asserted for the first time on appeal. The questioning leading to the offer of the papers strongly suggested that appellants' purpose in using the exhibit was to imply that allegations in the papers pre-

judicial to Wilt were true or to show that Wilt had acted improperly in the other lawsuit. Appellants do not now claim that Exhibit S was properly admissible on these grounds. Given appellants' failure to alert the trial judge to the purpose they now assert for their offer and the doubtful weight of the evidence even for this purpose, we decline to upset the trial court's ruling. *See United States v. King,* 560 F.2d 122, 128 (2d Cir.), *cert. denied,* 434 U.S. 925 (1977); *United States v. Dioguardi,* 428 F.2d 1033, 1038 (2d Cir.), *cert. denied,* 400 U.S. 825 (1970).

IX. Juror Number 7

Appellants claim that the trial court abused its discretion by refusing to *voir dire* juror number 7, who had advised the judge that he had been a juror two years earlier in a state court case which was "almost identical" to this one in that evidence had been collected surreptitiously. The trial court immediately informed all counsel that the colloquy had taken place and stated his opinion that the matter need not be pursued. Defense counsel neither objected nor requested a *voir dire.* Eleven days later, appellants expressed concern about the juror's statements and asked the court to *voir dire* the juror or to excuse him. Appellants explained their delay in complaining by asserting that they had not previously had a chance to examine the transcript of the court's conversation with the juror. After considering appellants' request overnight, the judge denied it, stating that juror number 7 had been attentive throughout the trial and had not appeared to form premature conclusions on the merits of the case. Appellants claim that this ruling denied them a fair and impartial jury.

This Court accords broad discretion to the trial judge to assess allegations of juror bias or misconduct, believing that "the trial judge observing the jury on a day to day

basis . . . is in the best position to sense the atmosphere of the courtroom as no appellate court can on a printed record." *United States v. Barnes,* 604 F.2d 121, 144 (2d Cir. 1979), *cert. denied,* 446 U.S. 907 (1980). *See also United States v. Panebianco,* 543 F.2d 447, 457 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977); *United States v. Flynn,* 216 F.2d 354, 372 (2d Cir. 1954), *cert. denied,* 348 U.S. 909 (1955). In *Barnes,* this Court approved the trial court's refusal to dismiss or to conduct a *voir dire* of a juror who had made an obscene gesture toward defense counsel outside the courtroom. Such juror activity plainly is significantly more indicative of possible bias or prejudice than that of juror number 7 in this case. On this record, we cannot conclude that Judge Carter abused his discretion.

X. The Wire and Mail Fraud Counts

Coven claims that:

> The government did not introduce any evidence at trial linking Coven to the act alleged in count ten—the transfer of funds [by wire] into the personal account of O'Connor. The government did not demonstrate that Coven promoted, participated in, or had any stake in this transfer, nor did it demonstrate that Coven even had knowledge of this patently personal transaction by O'Connor.

Appellant Coven's Brief at 49. Accordingly, he asserts, the wire fraud count should be dismissed as to him.

Coven's conclusion is incorrect.

> To prove a violation of 18 U.S.C. §1341, the Government need only show that a defendant was one of the participants in a scheme to defraud, and that the mails were used in furtherance of that scheme. *See, e.g., United States v. Cyphers,* 556 F.2d 630, 632 (2d Cir. 1977); *United States*

> *v. Finkelstein,* 526 F.2d 517, 625-27 (2d Cir. 1975), *cert. denied sub nom. Scardino v. United States,* 425 U.S. 960 96 S. Ct. 1742, 48 L.Ed. 2d 205 (1976). Similarly, to prove a violation of 18 U.S.C. §1343, it need only be shown that a defendant was one of the participants in a fraudulent scheme which was furthered by the use of interstate transmission facilities. *United States v. Houlihan,* 332 F.2d 8, 13 (2d Cir.), *cert. denied,* 379 U.S. 828, 85 S.Ct. 56, 13 L.Ed.2d 37 (1964).

United States v. Corey, 566 F.2d 429, 430-31 n.2 (2d Cir. 1977). There was ample evidence in the record to support a finding that Coven was a participant in the overall scheme to defraud MHS, HP, receiver Glusband and the district court, and that the wire transfer of Euro-Swiss funds to O'Connor's personal account was in furtherance of that scheme. Coven was properly convicted of wire fraud.

In addition to Coven's specific claim that there was insufficient evidence to link him to the wire fraud, appellants contend generally that there was no evidence that the mailings and the wiring charged by the government were done other than in the usual course of business. Appellants assert, therefore, that there was insufficient evidence to prove that the mailings and the wiring were in furtherance of a scheme to defraud.

The evidence viewed, as it must be, in the light most favorable to the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), renders this claim ridiculous. There was abundant evidence that the mailings were used to open out-of-state bank accounts in the names of "dummy" corporations and to transfer Euro-Swiss assets into these and other accounts outside New York in an attempt to conceal monies from MHS, HP and the receiver, and to place them beyond the reach of New York State attachment. There was evidence establishing that the wire transfer was undertaken to remove some of the assets in one of the out-

of-state accounts to O'Connor's personal account at Bache Halsey Stuart Shields, Inc. The mailings and wiring in this case were clearly central, not incidental, to the scheme to defraud. *See, e.g., United States v. Braunig,* 553 F.2d 777, 781-82 (2d Cir.), *cert. denied,* 431 U.S. 959 (1977).

XI. O'Connor's Effective Assistance of Counsel Claim

O'Connor claims that he was denied effective assistance of counsel at the attachment proceeding because Judge Motley failed to inform him that his lawyer, Coven, was under criminal investigation at the time the attachment hearing was held. This claim is frivolous. Even if the Sixth Amendment right to counsel applied to civil cases, which it does not, *e.g., Watson v. Moss,* 619 F.2d 775, 776 (8th Cir. 1980), it is clear that O'Connor knew of and participated in Coven's criminal activities both prior to and during the attachment hearing. Under these circumstances, this claim merits no further discussion.

XII. Sentencing

Appellants' final point charges that the trial court abused its discretion in sentencing by relying on an inaccurate and prejudicial sentencing memorandum filed by the government and by pronouncing a "Draconian" sentence, so harsh as to shock the conscience, on young, first-offender O'Connor.

Before passing sentence in this case, the trial judge allowed Coven and O'Connor, both personally and through counsel, to state objections to specific points in the government's memorandum and to offer whatever other statements they wished the court to consider in sentencing. Appellants did not request additional time to prepare a more formal response to the government's

memorandum. Moreover, Judge Carter specifically stated that his sentence would be based on the crimes of which appellants had been convicted and on his observance of appellants' demeanor throughout the trial, and not on any contested matters in the government's memorandum.

An appellate court's power to review a sentence within the statutory range is extremely limited. *E.g., Dorszynski v. United States,* 418 U.S. 424, 440-41 (1974); *United States v. Swarovski,* 592 F.2d 131, 133-34 (2d Cir. 1979). In this case, we cannot say that the trial court abused its discretion to a degree that would permit this Court to interfere. Indeed, the sentences imposed in this case appear reasonable in light of the serious nature of the offenses involved.

We find no error in the judgments below. Affirmed.

FOOTNOTES

* Honorable M. Joseph Blumenfeld, United States District Judge for the District of Connecticut, sitting by designation.

1. The sentences were calculated as follows: five years imprisonment on each of the counts of conspiracy, mail fraud and wire fraud, to run concurrently, and five years imprisonment on each of the counts of obstruction of justice and false declaration, to run concurrently with respect to each other but consecutively with respect to the terms imposed on the counts of conspiracy, mail fraud and wire fraud.

2. On June 1, 1978, Commodity Futures Trading Commission Rule 32.11, 17 C.F.R. §32.11, went into effect. This rule, promulgated pursuant to 7 U.S.C. §12a(5) (1976), made it unlawful "for any person to solicit to accept money, securities or property in connection with, the purchase or sale of any commodity option, or to supervise any person or persons so engaged." Congress later confirmed this position by codifying Rule 32.11 in the Commodity Futures Trading Act of 1978, §4c(c), 7 U.S.C. §6c(c).

The MHS and HP contracts, which purported to be deferred delivery contracts rather than commodity options, were apparently designed to circumvent the prohibition on sales of commodity options. This attempt to disguise the contracts was destined to fail. *See, e.g., CFTC v. U.S. Metals Depository Co.*, 468 F. Supp. 1149 (S.D.N.Y. 1979).

3. Section 455 provides, in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts, concerning the proceeding. . . .

4. In any event, we have grave doubts as to whether a finding that Judge Motley was incorrect in failing to recuse herself in the civil proceeding would provide any basis for relief in this criminal action. Certainly dismissal of the indictment would be inappropriate. *See United States v. Fields,* 592 F.2d 638, 646-48 (2d Cir. 1978), *cert. denied,* 442 U.S. 917 (1979). Because we find that Judge Motley acted properly, we decline to speculate about the possibilities for other forms of relief had we found merit in appellants' recusal argument.

5. Even if *Parrott* and *Guerrina* were apposite, we would hesitate to dismiss the indictment. In *Guerrina,* the Eastern District of Pennsylvania merely suppressed evidence on the basis of Fourth and Fifth Amendment violations. In *Parrott,* the United States District Court for the District of Columbia dismissed an indictment on the basis of a violation of the Sixth Amendment right to a speedy trial. The court specifically stated that were it not for the speedy trial violation, suppression of evidence would have been the appropriate remedy unless the improperly gathered evidence was a basis for the entire criminal prosecution. 248 F. Supp. at 202.

This Court has stated that dismissal of an indictment is to be used only "in the rare case, where it is impossible to restore a criminal defendant to the position that he would have occupied vis-a-vis the prosecutor. . . ." *United States v. Fields,* 592 F.2d 638, 648 (2d Cir. 1978), *cert. denied,* 442 U.S. 917 (1979).

6. The comments to which appellants object were as follows:

[Assistant U.S. Attorney Strauss]:

You will notice from the testimony of Joan Werring that the two entries for the Mexican peso orders were not in her handwriting. None of the surrounding entries were in her handwriting. Whose handwriting were they in? In the handwriting of Harriet Gilmore.

Isn't it interesting, ladies and gentlemen, the defendants call not Harriet Gilmore but Joan Werring?

Mr. Anolik [O'Connor's counsel]: Objection, your Honor.

The Court: Overruled.

Mr. Anolik: We have no obligation to call anyone.

The Court: That objection is overruled.

Ms. Strauss: Mr. Gold [Coven's counsel] asked Joan Werring: Did you alter, did you fabricate, that customer ledger? But Harriet Gilmore is not on the stand and they are not asking that question of her. Why wasn't she called? . . .

They didn't call Harriet Gilmore and ask those questions because she would have buried them deeper than the evidence against them already is in this case.

7. During his summation, Mr. Anolik, attorney for appellant O'Connor stated:

Mr. Anolik: . . .

These defendants, our clients, are entitled to a presumption of innocence. His Honor will explain that. But that means, ladies and gentlemen, that they're presumed innocent.

Ms. Strauss indicated that—you heard me object—that a person by the name of Harriet Gilmore was not called. We have no obligation to call or not call anyone because, as his Honor will tell you in the charge—and I am not presuming to charge you on the law, only Judge Carter can do that—but as his Honor will tell you, we don't have to prove or disprove anything.

Our clients are presumed innocent and the entire burden of proof beyond a reasonable doubt is on the government.

Thank God in this country there is a presumption of innocence, not a presumption of guilt.

So why Ms. Strauss who I'm sure knows better than that would say such a thing, I don't know. Perhaps she can tell you when she comes back and addresses you.

On rebuttal, Assistant United States Attorney Strauss responded:

Ms. Strauss: . . .

In a similar vein, Mr. Anolik says: Why did Ms. Strauss comment on the fact that the defendants failed to Harriet Gilmore [sic]?

And I think he said something along the lines: Ms. Strauss knows better than that.

In response to that, ladies and gentlemen, I think I am entitled to tell you that I know that the law does permit me to make such an argument. Mr. Anolik made an objection. It was overruled by Judge Carter—and you know very well if he was right and his objection valid—

Mr. Anolik: Objection, your Honor.

The Court: I think she is entitled to say that. You may proceed.

Ms. Strauss: If his objection had been valid it would have been sustained, and Judge Carter would not have permitted me to make the argument. I was permitted to do so because it was a proper argument and something you should continue to think about. Harriet Gilmore was the one who wrote the Mexican pesos transactions in the customer ledger, but they didn't call her and ask her whether she altered the books and records. They have called someone else who didn't make the entry.

8. *White* was not, as appellants assert, a plurality decision. As Judge Friendly said in *United States v. Bonnano,* 487 F.2d 654, 657, n. 1 (2d Cir. 1973):

[Appellant] argues that *White's* binding effect is limited by its having produced a "4-4 split" on the major issue, with a fifth vote, that of Justice Brennan, having been attracted to the majority only on the narrow ground that *Katz* lacked retroactive effect. This argument misses the point that Justice Brennan was the sixth and not the fifth vote in the *White* majority. Justice Black concurred

with the four-man plurality not on a narrow ground like that of Justice Brennan, but rather on the extremely broad one that eavesdropping by electronic means does not constitute a "search" or "seizure" within the meaning of the Fourth Amendment. *White* is therefore authoritative on the constitutional validity of recording and transmitting devices on the person. . . . .

APPENDIX "B"

Title 18 U.S.C. §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 U.S.C. §1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. §1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523.

Title 18 U.S.C. §1503. Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats

or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. §1623. False declarations before grand jury or court.

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declarations is false if—

(1) each declaration was material to the point in question and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the

defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Title 28 U.S.C. § 455. Disqualification of Justice, judge, magistrate, or referee in bankruptcy.

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.